

No. 15737

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,
vs.

PETE JOHNSON, F. DOUGLAS MAJOR,
JANE KENDLE MAJOR, NELSON T.
BRUCE and CLEO BRUCE, Appellees.

Transcript of Record

Appeal from the United States District Court for the
Western District of Washington,
Northern Division

FILED

FEB 13 1958

PAUL P. O'BRIEN, CLERK

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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United States District Court, Western District
of Washington, Northern Division

Civil Action No. 4133

PETE JOHNSON, F. DOUGLAS MAVOR,
JANE KENDLE MAVOR, NELSON T.
BRUCE and CLEO BRUCE, Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

PRETRIAL ORDER

As a result of pretrial conferences heretofore had, whereat the plaintiffs were represented by Arthur E. Simon and the defendant by Charles P. Moriarty, United States Attorney for the Western District of Washington, the following issues of fact and law were framed and exhibits identified:

Admitted Facts

I.

That under Title 28, United States Code, § 1346 (a)(1), and under Title 28, United States Code, § 1402(a), this Court has jurisdiction of the causes of action set forth in the complaint of the plaintiffs herein.

II.

That at all times referred to in the complaint, all of the plaintiffs were residents of the Western District of Washington.

III.

That after June, 1946 and at all times herein referred to the plaintiffs Pete Johnson, F. Douglas Mavor and Nelson T. Bruce were partners doing business under the firm name and style of "Johnson & Mavor Logging Company." That the plaintiff Pete Johnson was at all times mentioned in the complaint an unmarried man, but that plaintiff Cleo Bruce was at all times mentioned in the complaint the wife of Nelson T. Bruce, and plaintiff Jane Kendle Mavor was at all times referred to in the complaint the wife of plaintiff F. Douglas Mavor. A copy of this agreement of limited partnership is attached hereto as Pretrial Exhibit A.

IV.

Said partnership filed a federal partnership return of income and Forest Industries Schedule, Form T, for the period from March 1, 1947, to February 29, 1948, reporting ordinary net income of \$11,163.26 and net long term capital gain of \$11,921.66. Individual separate and joint income tax returns were filed which included the partners proportionate share of partnership income. The income taxes shown due on said returns were paid. A copy of both the said partnership return and Form T are attached as Pretrial Exhibit B.

V.

The said Johnson & Mavor Logging Company was engaged in the business of logging. On or about

July 23, 1946, a written "Agreement" was entered into between the partnership and Puget Sound Pulp & Timber Co., a copy of which is attached as Pretrial Exhibit C.

VI.

That during the period from March 1, 1947, to February 29, 1948, Johnson & Mavor Logging Company cut approximately 5,093,640 board feet of timber from the property covered by the agreement (Pretrial Exhibit C); reporting net long term capital gains in the amount of \$11,921.66 on the federal partnership return filed for the period. Said partners reported their respective shares of these gains and paid income taxes thereon at the applicable rates.

VII.

That an Internal Revenue agent made an examination of said returns, that the reports of the Revenue agent asserted deficiencies of income tax for the calendar year 1948 in the total of \$3,477.27, which was based on the inclusion of \$23,843.31 derived from the contract with Puget Sound Pulp & Timber Co. as ordinary income instead of as long term capital gain under Section 117(k) of the Internal Revenue Code of 1939, as reported by plaintiffs.

VIII.

That on June 5, 1952, the Commissioner of Internal Revenue, in accordance with the said reports, assessed deficiencies against the plaintiffs which were paid as follows:

	Paid	Tax	Interest	Total
Nelson T. Bruce	4/23/52	96.00	17.92	113.92
Cleo Bruce	4/23/52	96.00	17.92	113.92
F. Douglas and Jane Mavor	4/23/52	1,016.06	189.73	1,205.79
Pete Johnson	4/23/52	2,269.21	423.74	2,692.95

IX.

Timely and proper claims for refund of these amounts were filed.

Plaintiffs' Contentions

I.

That the contract between plaintiffs and Puget Sound Pulp & Timber Co. gave plaintiffs the contract right to cut timber for sale, which right was held for more than six months and entitled plaintiffs to elect to treat the cutting thereunder as a sale or exchange under the provisions of Section 117(k) of the Internal Revenue Code of 1939.

II.

That the plaintiffs properly exercised the right so to elect and they are entitled to recover in accordance with the prayer of the complaint.

Defendant's Contentions

I.

That the contract between plaintiffs and Puget Sound Pulp and Timber Co. did not convey an interest in the timber cut under the agreement so as to entitle plaintiffs to elect to report the gain from

logging operations as capital gain under Section 117(k) of the Internal Revenue Code of 1939.

II.

Accordingly, plaintiffs are not entitled to refunds in this case and their complaint should be dismissed.

Issue

Whether the contract dated July 23, 1946, and performance thereof were sufficient to establish for the purposes of Section 117(k) of the Internal Revenue Code of 1939 that timber was cut (for sale or use in the taxpayers' trade of business) during the period from March 1, 1947, to February 29, 1948, and whether they owned or had such contract right to cut such timber for a period of more than six months prior to March 1, 1947.

Exhibits

The exhibits of all parties were produced and marked, and may be received in evidence if otherwise admissible without further authentication, it being admitted that each is what it purports to be. Each party waives objection that any such exhibit is a copy rather than an original.

A. Agreement of limited partnership dated June 24, 1946.

B. Partnership return of income for year ending February 29, 1948, and Form T.

C. Agreement dated July 23, 1946, between Johnson & Mavor Logging Company and Puget Sound Pulp & Timber Co.

Action by the Court

The foregoing Pretrial Order has been approved by the parties hereto, as evidenced by the signatures of their counsel, and this Order is hereby entered, as a result of which the pleadings pass out of the case, and this Pretrial Order shall not be amended except by order of the Court pursuant to agreement of the parties or to prevent manifest injustice.

Dated at Seattle, Washington, this 24th day of December, 1956.

/s/ GEO. H. BOLDT,
United States District Judge.

Approved as to form only:

/s/ ARTHUR E. SIMON,
Attorneys for Plaintiffs.

/s/ ALLEN A. BOWDEN,
Attorney for Defendant.

[Endorsed]: Filed January 24, 1957.

United States District Court
Western District of Washington

Chambers of George H. Boldt, United States District Judge, Tacoma, Washington.

June 13, 1957

To all counsel:

Re: Johnson v. U. S.—N.D. #4133.

Gentlemen:

At the conclusion of the trial in the above cause the court, upon stipulation of counsel, withheld de-

cision awaiting the disposition by the Court of Appeals of the case of Ellison v. Frank, S.D. #1938. The Ellison case has now been decided (Ellison v. Frank No. 15318, May 27, 1957).

Nothing in the Ellison opinion militates against my tentative intention to grant the relief prayed for by the plaintiff in this instance. Counsel for the plaintiff may submit appropriate findings of fact, conclusions of law and judgment and notice the same for hearing on a date convenient to counsel.

Very truly yours,

/s/ GEO. H. BOLDT,

George H. Boldt,

United States District Judge.

Wright, Innis, Simon & Todd

Mr. Charles P. Moriarty

Mr. Allen Bowden

Mr. Thomas R. Winter

Clerk

[Endorsed]: Filed June 14, 1957.

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Be It Remembered, that this matter came on duly and regularly for hearing on January 24, 1957, before Honorable George H. Boldt, United States District Judge, sitting in the above Court, without

a jury; and the plaintiffs appearing in person and being represented by Arthur E. Simon, of Wright, Innis, Simon & Todd, their counsel, and the defendant being represented by Charles P. Moriarty, United States Attorney for the Western District of Washington; and both sides having submitted their evidence and having rested; and the Court having heard the argument of counsel, and having taken the said matter under advisement, and having heretofore, on June 13, 1957, advised all counsel of the decision of the Court, and having directed the preparation of Findings and Judgment, and being in all things fully advised; Now, Therefore, the Court does hereby make the following:

Findings of Fact

I.

That under Title 28, United States Code §1346 (a)(1), and under Title 28, United States Code, §1402(a), this Court has jurisdiction of the causes of action set forth in the complaint of the plaintiffs herein.

II.

That at all times referred to in the complaint, all of the plaintiffs were residents of the Western District of Washington.

III.

That after June, 1946, and at all times herein referred to, the plaintiffs Pete Johnson, F. Douglas Mavor and Nelson T. Bruce were partners doing business under the firm name and style of "Johnson & Mavor Logging Company." That the plaintiff

Pete Johnson was at all times mentioned in the complaint an unmarried man, but that plaintiff Cleo Bruce was at all times mentioned in the complaint the wife of Nelson T. Bruce, and plaintiff Jane Kendle Mavor was at all times referred to in the complaint the wife of plaintiff F. Douglas Mavor. A copy of this agreement of limited partnership was received in evidence herein as Plaintiffs' Exhibit 1.

IV.

That said partnership filed a federal partnership return of income and Forest Industries Schedule, Form T, for the period from March 1, 1947, to February 29, 1948, reporting ordinary net income of \$11,163.26 and net long term capital gain of \$11,921.66. Individual separate and joint income tax returns were filed which included the partners' proportionate share of partnership income for each of the plaintiffs herein. The income taxes shown due on said returns were paid. A copy of the said partnership return and of the accompanying Form T were received in evidence herein as Plaintiffs' Exhibits 2 and 3, respectively.

V.

That the said Johnson & Mavor Logging Company was engaged in the business of logging. On or about July 23, 1946, a written "Agreement" was entered into between the said partnership and Puget Sound Pulp & Timber Co., a copy of which was received in evidence herein as Plaintiffs' Exhibit 4.

VI.

That during the period from March 1, 1947, to February 29, 1948, said Johnson & Mavor Logging Company cut approximately 5,093,640 board feet of timber from the property covered by the said agreement, reporting net long term capital gains in the amount of \$11,921.66 on the federal partnership return filed for the period. Said partners reported their respective shares of these gains and paid income taxes thereon at the applicable rates.

VII.

That an Internal Revenue Agent made an examination of said returns, that the reports of the Revenue Agent asserted deficiencies of income tax for the calendar year 1948 in the total of \$3,477.27, which was based on the inclusion of \$23,843.31 derived from the contract with Puget Sound Pulp & Timber Co. as ordinary income instead of as long term capital gain under Section 117(k) of the Internal Revenue Code of 1939, as reported by plaintiffs.

VIII.

That on June 5, 1952, the Commissioner of Internal Revenue, in accordance with the said reports, assessed deficiencies against the plaintiffs which were paid as follows:

	Paid	Tax	Interest	Total
Nelson T. Bruce	4/23/52	96.00	17.92	113.92
Cleo Bruce	4/23/52	96.00	17.92	113.92
F. Douglas and				
Jane Mavor	4/23/52	1,016.06	189.73	1,205.79
Pete Johnson	4/23/52	2,269.21	423.74	2,692.95

IX.

Timely and proper claims for refund of these amounts were filed.

From the foregoing Findings of Fact the Court deduces the following:

Conclusions of Law

I.

That the contract between plaintiffs and Puget Sound Pulp & Timber Co. gave plaintiffs the contract right to cut timber for sale, which right was held for more than six months and entitled plaintiffs to elect to treat the cutting thereunder as a sale or exchange under the provisions of Section 117(k) of the Internal Revenue Code of 1939.

II.

That the plaintiffs properly exercised the right so to elect and they are entitled to recover herein in accordance with the prayer of the complaint.

Done in Open Court this 15th day of July, 1957.

/s/ GEO. H. BOLDT,
United States District Judge.

Presented by:

/s/ ARTHUR E. SIMON,
Of Wright, Innis, Simon & Todd,
Attorneys for Plaintiffs.

Approved as to Form and Notice of Presentation
Waived:

/s/ JOHN A. ROBERTS, JR.,
Asst. U. S. Attorney,
Of Counsel for Defendant.

[Endorsed]: Filed July 16, 1957.

In the United States District Court, Western
District of Washington, Northern Division

Civil Action No. 4133

PETE JOHNSON, F. DOUGLAS MAVOR,
JANE KENDLE MAVOR, NELSON T.
BRUCE and CLEO BRUCE, Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

JUDGMENT

Be It Remembered, that this matter came on duly and regularly for hearing on January 24, 1957, before George H. Boldt, United States District Judge, sitting in the above Court, without a jury; and the plaintiffs appearing in person and being represented by Arthur E. Simon, of Wright, Innis, Simon & Todd, their counsel, and the defendant being represented by Charles P. Moriarty, United States Attorney for the Western District of Washington; and both sides having submitted their evidence and having rested; and the Court having heard the argument of counsel, and having taken

the said matter under advisement, and having heretofore, on June 13, 1957, advised all counsel of the decision of the Court, and being in all things fully advised, and the Court having heretofore made and signed written Findings of Fact and Conclusions of Law; Now, Therefore, in accordance with the aforesaid Findings of Fact and Conclusions of Law it is by the Court

Ordered, Adjudged and Decreed:

1. That the plaintiff Nelson T. Bruce do have and recover of and from the defendant, United States of America, the full sum of \$113.92, together with interest thereon at the rate of six per cent per annum from April 23, 1952, amounting to \$35.73 to this date.

2. That the plaintiff Cleo Bruce do have and recover of and from the defendant, United States of America, the full sum of \$113.92, together with interest thereon at the rate of six per cent per annum from April 23, 1952, amounting to \$35.73 to this date.

3. That the plaintiffs F. Douglas Mavor and Jane Kendle Mavor do have and recover of and from the defendant, United States of America, the full sum of \$1,205.79, together with interest thereon at the rate of six per cent per annum from April 23, 1952, amounting to \$378.16 to this date.

4. That the plaintiff Pete Johnson do have and recover of and from the defendant, United States of America, the full sum of \$2,692.95, together with interest thereon at the rate of six per cent per

annum from April 23, 1952, amounting to \$844.55 to this date.

5. That said plaintiffs do further have and recover of and from the said defendant, United States of America, their taxable costs and disbursements herein to be taxed by the Clerk.

Done in Open Court this 15th day of July, 1957.

/s/ GEO. H. BOLDT,
United States District Judge.

Presented by:

/s/ ARTHUR E. SIMON,
Of Wright, Innis, Simon & Todd,
Attorneys for Plaintiffs.

Approved as to form and Notice of Presentation
Waived:

/s/ JOHN A. ROBERTS, JR.,
Asst. U. S. Attorney,
Of Counsel for Defendant.

[Endorsed]: Filed and Entered July 16, 1957.

[Title of District Court and Cause.]

NOTICE OF APPEAL

To: Pete Johnson, F. Douglas Mavor, Jane Kendle Mavor, Nelson T. Bruce and Cleo Bruce, Plaintiffs, named above, and to Arthur E. Simon and Wright, Innis, Simon & Todd, their Attorneys:

You, and Each of You, will please take notice that the defendant, United States of America, does

hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from those certain Findings of Fact, Conclusions of Law and Judgment signed on July 15, 1957, and filed in the above-entitled action on July 16, 1957, and from each and every part and the whole thereof.

/s/ CHARLES P. MORIARTY,
United States Attorney,

/s/ THOMAS R. WINTER,
Special Assistant to the Regional Counsel, Internal
Revenue Service.

[Endorsed]: Filed September 9, 1957.

[Title of District Court and Cause.]

DESIGNATION OF POINT ON APPEAL

To: Pete Johnson, F. Douglas Mavor, Jane Kendle Mavor, Nelson T. Bruce and Cleo Bruce, Plaintiffs, named above, and to Arthur E. Simon and Wright, Innis, Simon & Todd, their Attorneys:

* * * * *

Point on appeal on which the defendant, United States of America, expects to rely:

1. That the Court erred in holding that the agreement of July 23, 1946, providing for the purchase of stumpage, cutting thereof, and sale of logs back to the vendor gives the logger a proprietary interest in the timber to entitle them to the election

permitted under Section 117(k)(1) of the Internal Revenue Code of 1939.

/s/ CHARLES P. MORIARTY,
United States Attorney,
/s/ THOMAS R. WINTER,
Special Assistant to the
Regional Counsel.

[Endorsed]: Filed November 22, 1957.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that pursuant to the provisions of Subdivision 1 of Rule 10 of the United States Court of Appeals for the Ninth Circuit and Rule 74(o) FRCP I am transmitting herewith the following original documents in the file dealing with the action, as the record on appeal herein to the United States Court of Appeals for the Ninth Circuit at San Francisco, said papers and documents being identified as follows:

1. Complaint, filed May 2, 1956.
2. Summons with Marshal's return thereon, filed May 7, 1956.
3. Answer, filed June 29, 1956.

4. Praecipe, Government, for subpoena in blank, (Rogers), filed 1-16-57.

5. Praecipe, Government, for subpoena in blank, (Sahlin), filed 1-23-57.

6. Pretrial Order, filed Jan. 24, 1957.

7. Marshals' Return on subpoena, Sahlin, filed 1-29-57.

8. Court Reporter's Transcript of Court's Oral Decision, filed 4-23-57.

9. Letter, Judge Boldt to counsel, dated June 13, 1957, re granting of judgment to plaintiffs, filed June 14, 1957.

10. Findings of Fact, Conclusions of Law, filed July 16, 1957.

11. Judgment, filed July 16, 1957.

12. Notice of Appeal, filed Sept. 9, 1957.

Plaintiff Exhibits numbered 1 to 5 inclusive, and Defendant Exhibit A.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by on or behalf of appellant for preparation of the record on appeal in this cause, to wit: Filing Notice of Appeal, \$5.00; and that said amount has not been paid to me for the reason that the appeal herein is being prosecuted by the United States.

Witness my hand and official seal at Seattle this 4th day of October, 1957.

[Seal]

MILLARD P. THOMAS,

Clerk,

/s/ By TRUMAN EGGER,

Chief Deputy.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that I am transmitting herewith supplemental to the record on appeal herein, and as a part thereof, the following additional original documents in the file dealing with the action, to wit:

13. Order extending time for docketing action on appeal to ninety days from first date of notice of appeal, filed Oct. 15, 1957.

14. Order extending time within which to furnish points and designate record to Dec. 4, 1957, incl., filed Oct. 25, 1957.

15. Court Reporter's Transcript of Proceedings, filed Nov. 22, 1957.

16. Designation of Contents of Record and Point on Appeal, filed 11-22-57.

Witness my hand and official seal at Seattle, this 25th day of November, 1957.

[Seal]

MILLARD P. THOMAS,
Clerk,

In the District Court of the United States, Western
District of Washington, Northern Division

No. 4133

PETE JOHNSON, F. DOUGLAS MAJOR,
JANE KENDLE MAJOR, NELSON T.
BRUCE, and CLEO BRUCE, Plaintiffs,

vs.

UNITED STATES OF AMERICA,
Defendant.

TRANSCRIPT OF PROCEEDINGS

Transcript of Proceedings taken in the above-entitled and numbered cause in the above-entitled court before the Honorable George H. Boldt, United States District Judge, on January 24, 1957, at the United States Courthouse, Seattle, Washington.

Appearances: On behalf of the Plaintiffs: Mr. Arthur E. Simon, Wright, Innis, Simon & Todd, Attorneys at Law, 1411 - 4th Avenue Building, Seattle, Washington. On behalf of the Defendant: Mr. Allen A. Bowden, Attorney, Department of Justice, Washington, D. C. [1]*

Proceedings

The Court: Are you ready with Johnson vs. United States?

Mr. Simon: Plaintiff is ready, your Honor.

Mr. Bowden: Defendant is ready, your Honor.

The Court: You may proceed.

* Page numbers appearing at top of page of Reporter's Transcript of Record.

The Clerk: Plaintiffs' Exhibits 1, 2, 3, and 4 have been marked for identification.

Mr. Simon: If the Court please, I suppose I should make an opening statement. I think that this case makes possible the shortest opening statement of any case I have ever had the privilege of presenting in court.

I think the issue and the sole issue in the case under the pretrial order and under the trial memorandum, which have been prepared by Mr. Bowden and myself, is whether the contract which has been marked for identification as Plaintiffs' Exhibit 4, which was pretrial order Exhibit No. 3, creates in the plaintiffs any proprietary interest in the logs—in the timber or the logs, resulting therefrom, so that they were entitled to claim capital gains treatment of the sales price, the income [2] derived from what we contend to have been the sales of those logs pursuant to the terms of Section 117(k) of the Internal Revenue Code of 1939.

With that much of an opening statement I am prepared to call my first witness.

The Court: Do you wish to make a statement now, Mr. Bowden?

Mr. Bowden: I don't believe it necessary.

DOUGLAS MAVOR

called as a witness on behalf of the plaintiffs, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

(Testimony of Douglas Mavor.)

The Witness: Douglas Mavor, M-a-v-o-r.

Direct Examination

Q. (By Mr. Simon): Where do you live, Mr.

Mavor? A. I live in Seattle.

Q. And how long have you lived in this community? A. About 39 years.

Q. You are one of the plaintiffs in this action?

A. Yes, sir. [3]

Q. Mr. Mavor, I hand you what has been marked for identification as Plaintiff's Exhibit No. 1 and ask you whether you recognize that instrument?

A. Yes, sir, I do.

Q. It purports to be an agreement of limited partnership between Pete Johnson and Nels Bruce and yourself.

I will ask you whether the document was actually signed on the date it bears by the people whose signatures purport to have been appended thereon?

A. Yes, sir, that is correct.

Mr. Simon: I offer Plaintiffs' Exhibit 1 in evidence.

Mr. Bowden: No objection.

The Court: It is admitted.

(Thereupon Plaintiffs' Exhibit No. 1 for identification was received into evidence.)

Q. (By Mr. Simon): Handing you Plaintiffs' Exhibit 2 for identification, I will ask you, Mr. Mavor, whether you recognize that as a partnership return of income—I will ask you whether or

(Testimony of Douglas Mavor.)

not you recognize it as a photostatic copy of the partnership return of income for the period from March 1, 1947, to February 29, 1948, of Johnson and Mavor Logging Company?

A. Yes, that is correct. [4]

Mr. Simon: I offer in evidence Plaintiffs' Exhibit No. 2.

Mr. Bowden: No objection.

The Court: Admitted.

(Thereupon Plaintiffs' Exhibit No. 2 for identification was received into evidence.)

Q. (By Mr. Simon): Handing you what has been marked as Plaintiffs' Exhibit No. 3 for identification, I will ask you whether or not you recognize that as the schedule which was submitted with and is a part of the income tax return of Johnson and Mavor Logging Company, a partnership, which has just been received in evidence as Plaintiffs' Exhibit No. 2? A. Yes, this is the exhibit.

Mr. Simon: Offer Plaintiffs' Exhibit No. 3 for identification.

Mr. Bowden: No objection.

The Court: Received.

(Thereupon Plaintiffs' Exhibit No. 3 for identification was received into evidence.)

Q. (By Mr. Simon): Mr. Mavor, I have asked the Clerk to hand to you what has been marked as Plaintiffs' Exhibit No. 4 for identification.

I will ask you whether you recognize that as a photostatic copy of a contract entered into between

(Testimony of Douglas Mavor.)

[5] Johnson and Mavor Logging Company and the Puget Sound Pulp and Timber Company?

A. Yes, sir. This is the final form of our agreement with Puget Sound Pulp.

Q. And I will ask you whether you signed that instrument? A. Yes, sir, I did.

Q. The original of it? A. Yes.

Q. And whether it was actually signed by the parties on the date of the acknowledgment? It bears the acknowledgment of—

The Court: Well, it is in the admitted facts that it was.

The Witness: Yes, it was.

Mr. Simon: I offer Plaintiffs' Exhibit No. 4 for identification in evidence.

Mr. Bowden: No objection.

The Court: Admitted.

(Thereupon Plaintiffs' Exhibit No. 4 for identification was received into evidence.)

Q. (By Mr. Simon): Mr. Mavor, one of your partners in this partnership of Johnson and Mavor Logging Company is Mr. Nelson Bruce who sits here, and the other partner—the other active partner is Mr. Pete Johnson?

A. Yes, that is correct. [6]

Q. And by reason of the fact that you and Mr. Bruce are married, your respective wives have an interest in the operations of the partnership, is that right? A. That is correct.

Q. Mr. Pete Johnson was a bachelor at all times involved here? A. Yes.

(Testimony of Douglas Mavor.)

Q. Mr. Pete Johnson is ill and unable to attend this trial, as I understand it?

A. I understand that is correct.

Q. Now, will you tell us about this Plaintiffs' Exhibit 4? By that I mean prior to the execution of this contract, prior to this particular contract, Plaintiffs' Exhibit 4, had your partnership ever had any business relationships with the Puget Sound Pulp and Timber Company?

A. No, not prior to this contract.

Q. And will you tell us how this contract came to be executed between you and that company?

A. Going back over the thing, as I recall it, we wrote a letter to Puget Sound Pulp and Timber in approximately April of 1946, and we received a letter from Mr. Sahlin stating that he was definitely interested in our inquiry; that he would like to talk to us.

We went up to Bellingham, as I recall, my [7] partner, Pete Johnson and myself, and discussed the possibilities of logging for Puget Pulp.

In May of 1946 we looked over a logging show that was offered to us by the pulp company, and after a couple months of negotiations regarding the logging of the timber, the contract requirements, specifications, we finally entered into this document on the 23rd of July of 1946.

Q. Now, in connection therewith will you tell us whether this contract, Plaintiffs' Exhibit No. 4, was originally submitted to you in that form?

(Testimony of Douglas Mavor.)

A. It definitely was not submitted exactly in this form.

Q. Will you tell us, please, how the negotiations were conducted?

A. They were conducted mainly between myself and Mr. Saline, as I recall. The pulp company, Puget Pulp, submitted to us a copy of an agreement which covered the sale in logging of this specific tract of timber. There were certain paragraphs and stipulations in the original agreement that we objected to. One of the important ones was on the sale of the logs. It is my definite recollection that the first agreement contained clauses which gave the pulp company the option to purchase our logs should they so desire. For several reasons we did not like the working of this particular [8] writing, and at our insistence the final document was changed so that in our opinion the pulp company was committed to buy the logs had we the desire to sell.

Q. Now, as I understand it, then, the first draft of this proposed agreement was sent by Mr. Sahlin to you or delivered to you?

A. I would say I believe that is correct.

Q. And then you discussed some contemplated changes, and there was a second draft and maybe a third draft, and ultimately a draft was produced which was signed and became the instrument which is certified—or a photostatic copy of which has been introduced here as Plaintiffs' Exhibit 4?

A. That is correct.

(Testimony of Douglas Mavor.)

Q. Now, in the course of those negotiations, who physically prepared the form of the instruments, what lawyer, if any?

A. They were prepared by the attorneys of Puget Pulp, Mr. Evans and Mr. George Powell of their law firm.

The Clerk: Plaintiffs' Exhibit No. 5 has been marked for identification.

Q. (By Mr. Simon): Calling your attention to Plaintiffs' Exhibit No. 5 for identification, I will ask you if you recognize those sheets of paper which have all been bound together? [9] A. Yes.

Mr. Bowden: I don't believe I have seen that Exhibit 5. I object to any additional exhibits at this time.

The Court: Well, see what it is. Has it been identified?

Mr. Simon: Yes.

The Court: What is it?

Mr. Simon: It is a sheaf of papers, of typewritten pages.

Mr. Bowden: Your Honor, prior to this time I haven't had an opportunity to go over it.

The Court: What is it?

Mr. Simon: May I go off the record, your Honor?

The Court: Certainly.

(Thereupon a discussion off the record was held.)

The Court: Back on the record.

Q. (By Mr. Simon): Do you recognize Plain-

(Testimony of Douglas Mavor.)

tiffs' Exhibit 5, Mr. Mavor? A. Yes, sir.

Q. Will you tell us what in general—what all of those papers are?

A. They are revised paragraphs from early writings of the contract submitted to us by Puget Pulp and Timber Company. [10]

Q. By that do you mean that these are paragraphs from prior drafts which were revised in the final draft? A. That is correct.

Mr. Simon: Offer Plaintiffs' 5 in evidence.

The Court: All right. You will have an opportunity to examine them at recess and consider whether you want to object or not.

Mr. Simon: I understood Mr. Bowden said he had no objection.

The Court: I won't rule on it for now.

Mr. Simon: That is all. You may inquire.

Mr. Bowden: I have no questions at this time, your Honor.

The Court: That is all, Mr. Mavor. Step down, sir.

(Witness excused.)

Mr. Simon: The Plaintiff rests. [11]

CLAYTON E. ROGERS

called as a witness on behalf of the defendant, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Clayton E. Rogers. R-o-g-e-r-s.

(Testimony of Clayton E. Rogers.)

Direct Examination

Q. (By Mr. Bowden): Mr. Rogers, what is your occupation?

A. I am treasurer of Puget Sound Pulp and Timber.

Q. How long have you been treasurer of the Puget Sound Pulp and Timber Company?

A. Since 1951.

Q. What position did you hold prior to that time, Mr. Rogers?

A. Chief accountant and comptroller.

Q. For how many years prior to 1951 were you in that capacity? A. May 1, 1943.

Q. And were you the chief accountant when the agreement in question was executed?

A. That is right.

Q. Could you very briefly tell us the business of Puget Sound Pulp and Timber Company, please?

A. We are manufacturing pulp chemicals and logging.

Q. Would you explain very briefly what that entails? In other words, would you simply describe the operations very briefly?

A. Well, I suppose we would start with logging, and we require the logs from the woods to integrate into our manufacturing facilities for the manufacturing of pulp. The refuse from the pulp in turn is manufactured into chemical by-products for commercial purposes.

Q. And the end products are sold on the open market, is that correct? A. That is right.

(Testimony of Clayton E. Rogers.)

Q. Now, were you in the timber business prior to 1941? A. Do you mean me personally?

Q. Yes. Were you individually connected with the timber business prior to 1941? A. Yes.

Q. How many years prior to that time?

A. Well, I have been—I was raised in the business, but I would say that about 1928 was my first, shall we say professional introduction into the business, and that continued until about 1934 or '35. It was about that time that I left it and returned in 1943.

Q. It would be fair to say you are acquainted with the timber business? [13]

A. Reasonably so.

Q. I have had occasion to look at this contract which was entered in with your company and Johnson and Mavor, is that correct.

A. That is correct.

Q. And you probably during the course of your experience have had occasion to examine logging contracts in general or contracts involved in the timber business in general, is that correct?

A. Oh, yes.

Q. Now, would you explain briefly to the court the method used in disposing of timber? By "disposing" I mean in selling timber, and by that, if I may explain it further, one type of agreement would be where there is an outright sale of the property and the timber, is that right?

A. That is right.

(Testimony of Clayton E. Rogers.)

Q. Now, could you explain other methods of selling timber stumpage?

A. Well, there would be the method in which you retain the right to the land but were selling the trees that were aboard the land.

Q. And would you sell the trees on the land at a lump-sum figure? Would that be one method?

A. There is the method of doing it that way, yes. [14]

Q. And are there other methods involved or often times employed in this area?

A. Yes, there is. There is the extraction basis in which the purchaser of the timber would pay for all the timber that comes off on a measurement basis.

Q. And what is that particular method commonly referred to as? Is it pay-as-you-cut method?

A. Well, I imagine you could call it pay-as-you-cut method.

Q. Would that be proper in the business to refer to it in that manner?

A. Well, I don't think I ever heard that expression used. I heard the expression as pay-on-the-extraction basis, which is probably the same thing, or pay-on-the-water scale of the timber produced from certain lands, or the scale of the timber produced from land.

Q. Well, is the purpose of that agreement to purchase the timber at so many dollars per thousand scaled at a particular place? A. Yes.

Q. Well, are you familiar with any other method

(Testimony of Clayton E. Rogers.)

which is commonly employed for the sale of timber?

A. Well, as I say, the outright sale of the timber, the sale of the timber on the extraction basis, and sale of the timber on timber land as a single unit. [15]

Q. Now, under all three of those methods is it generally the practice under these agreements that the purchaser can dispose of that timber in any way, shape, or form, he desires after it has been cut?

Mr. Simon: I object to that as irrelevant and immaterial.

The Court: I would assume, counsel, that that would be dependent upon the particular contract in a given case. It is hardly a question that you can generally answer, is it?

Mr. Bowden: I think you are right, your Honor. Perhaps I can make it more precise.

Q. (By Mr. Bowden): In your opinion, under an agreement whereby a purchaser purchases the land and the timber, would there be any question in your mind that the purchaser could cut and dispose of that timber in any fashion he desired?

Mr. Simon: Same objection.

The Court: It seems to me that here we have got a question of law. It wouldn't be of much value to the court in any event. It is obvious that on a piece of property including the timber and land he can do with it what he wants if he pays for it.

Mr. Bowden: I will pass that question. [16]

(Testimony of Clayton E. Rogers.)

Q. (By Mr. Bowden): You are familiar with the Johnson-Mavor contract, is that right?

A. Yes.

Q. Under that contract you—you have read the requirements? A. Yes.

Q. Under that contract could Johnson-Mavor do anything but deliver that timber to you?

Mr. Simon: I object to that as calling for a conclusion of law.

The Court: Sustained. That is a question that the judge has got to decide.

Q. (By Mr. Bowden): Were any of the contracts sent to Johnson-Mavor?

A. Not to my knowledge.

Q. Would that have come to your attention if that had been the case? A. Yes.

Q. In the course of your duties?

A. Yes. It would come to my attention.

Q. Did Puget Sound Pulp and Timber Company pay the personal property taxes on the logs cut under this particular agreement?

Mr. Simon: I object to that unless it is specified where the logs were on the date of the [17] levy of the assessment.

The Court: That would have to be stated, of course. You had better clarify that before you get to the final answer.

If taxes were paid, then you can answer that in general. Were some taxes paid on these logs?

The Witness: I assume they were.

The Court: You assume?

(Testimony of Clayton E. Rogers.)

The Witness: I am assuming. I would have to look the records up.

Q. (By Mr. Bowden): You don't recall when you paid the taxes on any of this timber or not, is that correct?

A. I can't remember directly, sir, that we did or didn't.

Mr. Bowden: No further questions, your Honor.

The Court: Any cross examination, Mr. Simon?

Cross Examination

Q. (By Mr. Simon): Mr. Rogers, in connection with the various types of disposition by the owner of standing timber to which you have testified on your direct examination regardless of the form that those transactions take, it has been your experience, has it not, that if the vendor of the [18] timber owns other timber in the area, or if this is an extensive tract which will require a considerable period for removal of the logs, that in the contract of sale the owner customarily includes provisions to protect himself against improper logging practices and that sort of thing, is that not true? A. Oh, yes, that is true.

Q. Included in those customary provisions would be provisions that the grantee in the deed or the purchaser under the contract of sale on the stumpage basis would comply with forest regulations, that he couldn't sell or transfer his rights under this contract to a person without the consent of the owner, that he agreed to dispose of slash and

(Testimony of Clayton E. Rogers.)

abide by the rules and regulations of the State Department; those protective agreements and covenants likewise fixing the standard of logging and the providing for the delivery to a certain place for scaling and those things, where the price is based on stumpage, those provisions would customarily be included regardless of the form of the sale, wouldn't you say?

A. No, I wouldn't agree with that. I would say that if it is a contract in which the timber was being removed on a time basis and being paid for on a time basis, where the title to the land was remaining in the hands [19] of the owners, I think those would be customary procedures to have.

The Court: These security measures that Mr. Simon spoke of?

The Witness: Yes, sir. I think it would be customary under that type of condition. On the other hand, where the land and the trees were sold outright in fee, I don't imagine that there would be any reason for that type of procedure.

Q. (By Mr. Simon): My question presupposed what I had stated in the question before. What I had in mind was if the vendor retained substantial timber interests in the immediate vicinity. But for any purpose your answer was sufficient. I think that is all.

The Court: Is there anything further, Mr. Bowden?

Mr. Bowden: No further questions.

The Court: You are excused and may leave whenever you wish.

(Witness excused.) [20]

CARL V. SAHLIN

called as a witness on behalf of the defendant, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Carl V. Sahlin, S-a-h-l-i-n.

Direct Examination

Q. (By Mr. Bowden): Will you state your occupation?

A. I am logging manager for Puget Sound Pulp and Timber Company.

Q. How long have you occupied that position?

A. Since 1942.

Q. Mr. Sahlin, you have heard this question asked of Mr. Rogers and I will ask the same of you, in your experience in the timber business would you state the three general types of agreements entered into between purchasers and sellers of timber?

A. Outright sale of timber and land is one, or the sale of stumpage where the land is retained, and——

The Court: By “stumpage” you mean the sale of the timber?

The Witness: Sale of the timber where the land is retained, or the sale of timber commonly [21]

(Testimony of Carl V. Sahlin.)

called stumpage as it is taken off of the land, or being removed and logged and scaled.

Q. (By Mr. Bowden): I see.

The Court: In stumpage contracts the buyer gets the stumpage as of the time of the purchase, whereas in these time provisions, the third category, they are purchased as cut, is that the distinction?

The Witness: Yes.

Q. (By Mr. Bowden): In other words, as you cut, why, you become the owner of it, is that correct? A. Yes.

Q. You are familiar with the Johnson-Mavor Company? A. Yes.

Q. Do you know the business that they are in?

A. I know the business they were in.

Q. Well, excuse me. What business were they in in 1946, '7 and '8?

A. They represented themselves as loggers.

Q. And you heard Mr. Rogers state the business of Puget Sound Pulp and Timber Company. Would you agree with his explanation of that business? A. Yes.

Q. Now, would you tell us very roughly approximately how many million board feet of timber that Puget Sound now [22] owns, just very approximately?

A. We have lots of competitors in the business.

The Court: I think he just wants to get a general idea of the amount of quantity of timber that you people have.

(Testimony of Carl V. Sahlin.)

Q. (By Mr. Bowden): Would you say that your holdings are extensive? A. Yes.

Q. Were your holdings extensive in 1946?

A. Yes.

Q. Have you had occasion since 1946 to sell or otherwise dispose of any of your holdings?

A. Yes.

Q. Is it a common practice in your business—in the business of Puget Sound Pulp and Timber to sell some of its timber holdings?

Mr. Simon: I object to that as incompetent and immaterial.

The Court: I think it is.

Mr. Bowden: Perhaps it is a conclusion, your Honor.

Q. (By Mr. Bowden): You are familiar with the Johnson-Mavor contract that we have been discussing, is that correct, sir?

A. That was ten years ago. [23]

Q. You heard Mr. Mavor discuss negotiations that he had with you on this contract? Do you recall him discussing those? A. Yes.

Q. The contract which was finally executed which had been negotiated by you represented what you considered to be the terms of the contract when it was executed, is that correct? A. Yes.

Q. Now, under this contract one of the provisions—would you hand the witness Plaintiffs' Exhibit 4?

Now, is it your understanding that that paragraph requires Johnson and Mavor to deliver all

(Testimony of Carl V. Sahlin.)

logs cut to Puget Sound Pulp and Timber Company?

Mr. Simon: Just a moment. I object to that as calling for a conclusion of the witness on a matter of law.

The Court: Sustained. It must be sustained. It is the parol evidence rule, of course.

Mr. Bowden: Well, your Honor, his understanding of the agreement and how it was carried out I think is important to this particular proceeding. This witness is familiar with the exact operation under the contract.

The Court: I haven't precluded you from [24] going into the operation and what was actually done. You may go ahead with that. What this witness's understanding is, is not material.

Q. (By Mr. Bowden): Under the provisions of the contract were all the logs cut delivered to Puget Sound Pulp and Timber?

Mr. Simon: I object to the incorporation of the words "under the terms of the contract."

The Court: Delete that portion. You have asked the same question over again in a little different form.

Q. (By Mr. Bowden): All I am interested in finding out is whether Johnson and Mavor did deliver to you all the logs which were cut by them?

The Court: On the properties referred to in the contract. That is what he means.

The Witness: They did all of them to my knowledge.

(Testimony of Carl V. Sahlin.)

Q. (By Mr. Bowden): Do you have any knowledge of them selling any of that timber or those logs to anybody other than Puget Sound Pulp and Timber Company? A. No.

Q. Now, in these negotiations which Mr. Simon referred to, an option arrangement which had been discussed or talked about prior to entering into the agreement—do you [25] remember Mr. Mavor mentioning that? A. Yes.

Q. Now, do you recall any discussions or negotiations at which time you discussed an option arrangement of any kind?

A. I don't recall distinctly. It very well could have been because I negotiate and have hundreds of these contracts.

The Court: You don't recall one, but by that you don't mean to say there wasn't one, is that right?

The Witness: That is right.

Q. (By Mr. Bowden): What was the purpose of this agreement—strike that. What was the purpose of this agreement?

Mr. Simon: I object to that as calling for a conclusion of the witness on a matter of law.

The Court: The document has got to speak for itself for what its purposes were.

Mr. Bowden: I think you are right.

The Court: Then we are agreed.

Mr. Bowden: It is a little difficult to question on this document. It is, you might say, our contention that parol evidence should be allowed to ex-

(Testimony of Carl V. Sahlin.)

plain this document, explain what was intended by the parties and the ultimate [26] purpose which was attempted to be accomplished here. There are words in here which are, in our opinion, ambiguous.

The Court: Has that issue been raised? I don't see any issue of ambiguity raised.

Mr. Bowden: There is no issue of ambiguity, your Honor. All we are asking the witness——

The Court: If there is an issue of ambiguity, I would look and see if the thing was ambiguous and determine that as a preliminary for admitting parol evidence concerning it. However, in view of the fact that we have a non-jury trial here, I will allow you to make your showing on it and then consider what, if any, weight or effect is to be given to it. Go ahead.

Mr. Bowden: Thank you, your Honor.

Q. (By Mr. Bowden): I would like to ask you one question.

Were any other agreements entered into between you or your company and Johnson and Mavor in respect to the timber which is referred to in this particular agreement?

A. There was a letter—an amendment agreement pertaining to a certain clause in here in this agreement, not respective to timber but respective to payments due to increased wages. [27]

Q. Briefly, then, could you tell what that letter was all about?

(Testimony of Carl V. Sahlin.)

Mr. Simon: That is objected to as not the best evidence.

The Court: That is right. The letter itself would be the best evidence. If it can be shown not to be in existence——

Q. (By Mr. Bowden): Was there an agreement—any other agreement other than this and other than the letter that you refer to now, either oral or written, entered into between you and Johnson and Mavor?

A. As I recall, other than the final closing of the contract.

Q. So, in other words, this embodied the entire agreement between you and Johnson-Mavor, is that correct? A. Yes.

Q. Now, you mentioned the closing of this agreement. There was a subsequent agreement entered into in that respect, is that correct?

A. Where both parties agreed that they were not liable to each other when the contract was agreed upon to be completed.

Mr. Bowden: I would like to introduce this agreement for mutual release.

The Court: All right. Have it marked. [28]

The Clerk: Defendant's Exhibit A has been marked for identification.

Q. (By Mr. Bowden): Do you recognize that as a copy of the agreement entered into between your company and Johnson-Mavor? A. Yes.

Mr. Bowden: Do you have any objection to it?

Mr. Simon: If the Court please, my only objec-

(Testimony of Carl V. Sahlin.)

tion is that I don't believe it is material to any of the issues in the case.

The Court: It may not be, but I will admit it and consider what, if any, weight is to be given to it. It is admitted.

(Thereupon Defendant's Exhibit A for identification was received into evidence.)

The Court: What is it?

Mr. Bowden: Mutual release executed on December 8, 1950.

The Court: All right.

Q. (By Mr. Bowden): Would you please tell of any negotiations which led up to the entering of that agreement or what that agreement was a result of?

A. There was disagreement towards the end of the production of logs into the contract as to the price schedule that [29] was arrived at in payment for the logs by Puget Sound Pulp to Johnson and Mavor.

Q. Would you tell a little bit more about the conflicts that arose and what the resolution was?

A. Under the contract, as I recall, it used a general going market price for the Loggers Association price to base the amount of monies that we paid them for the logs, and during the course of administration of the contract and the logging of the timber, Johnson and Mavor maintained we did not pay them enough, and we finally resolved that we had not and paid them some more.

Q. So the purpose of that mutual release was to

(Testimony of Carl V. Sahlin.)

make the final payment under the contract, is that correct?

A. A final agreement for mutual release.

Q. Well, let me ask you one thing further, then. What exactly was that money paid for? Was it an additional payment or a final payment under the contract?

A. Well, it was a final payment under the contract as resolved from negotiations from a dispute that—as to what the market price of logs under the contract was, and they convinced us that we had not paid them enough, so we paid them some more, and they agreed to take that amount and we agreed to pay that amount.

Q. Briefly, it is a payment under the contract whereby you [30] revised or increased the payment for certain logs, is that correct?

Mr. Simon: I object to that as leading and suggestive and contrary to the facts.

The Court: I think it is leading. On that ground the objection will have to be sustained. Restate the question.

Q. (By Mr. Bowden): Precisely what was this payment for?

Mr. Simon: I object on the grounds that the witness has already answered that.

The Court: I am not clear what he had in mind because the contract, Mr. Sahlin, seems to provide a specific dollar price, so much per thousand for hemlock and so much for cedar and so forth.

(Testimony of Carl V. Sahlin.)

Mr. Simon: That is the stumpage, your Honor. The payment for the logs is later.

The Court: Where is that provided? What paragraph is that in, so much for the booming and rafting and so forth?

Mr. Bowden: Paragraph four, your Honor.

Mr. Simon: Paragraph five. Current market prices shall mean the prices paid——

The Court: All right. I understand.

Mr. Simon: As I understand it, if the court [31] please, this witness has already said that there was a dispute between the parties as to what the amount was, and they conceded finally that our contention was correct and their prior contention was wrong.

The Court: In other words, it was paid pursuant to paragraph five of the contract, I take it, which is the one that specifies the current market prices?

The Witness: Without distinctly reviewing those negotiations of some years ago, there were other things that entered into it that they were maintaining, and I don't recall the figures of how they resolved it or whether they were a part of this. Part of it, as I recall, was in regard to in case wages increased that there was a certain formula under the contract of how the certain payments were to be made, OPA stumpage prices and various other things, OPA log prices.

Q. (By Mr. Bowden): That was a culmination of a dispute over the prices to be paid to Johnson-Mavor, is that correct? A. Yes.

(Testimony of Carl V. Sahlin.)

Mr. Bowden: No further questions of this witness. [32]

Cross Examination

Q. (By Mr. Simon): As I understand it, there had been at the close of or immediately prior to the eighth day of December of 1950, a couple years after the transactions involved in the case, I may say to the Court, a dispute as to the prices which were payable to the Johnson and Mavor Logging Company for the logs sold by them to you under this contract, which has been admitted in evidence as Plaintiffs' Exhibit 4, and as a result of argument back and forth you finally resolved all of your differences and you paid them a certain sum and each party executed this release, which was a mutual release in evidence, that you had paid them all sums due and that you had no further claim against them? A. Yes.

Mr. Simon: That is all.

The Court: That is all, Mr. Sahlin. You may leave whenever you wish.

(Witness excused.) [33]

DOUGLAS MAVOR

called as a witness on behalf of the defendant, having been previously sworn, resumed the stand, and testified further as follows:

The Clerk: You have been previously sworn. Resume the stand, please.

Direct Examination

Q. (By Mr. Bowden): Mr. Mavor, were any of

(Testimony of Douglas Mavor.)

the logs cut under the agreement dated July 23, 1946, delivered to anyone other than Puget Sound Pulp and Timber Company by you?

A. Not to my knowledge.

Q. Were all logs in accordance with the agreement branded with the Puget Sound brand?

A. I would say to the best of my knowledge that not all of them were. Some of them were branded, perhaps, with our own brand, our own log brand.

Mr. Bowden: No further questions, your Honor.

Mr. Simon: That is all, Mr. Mavor.

(Witness excused.) [34]

HOWARD CONKLE

called as a witness on behalf of the Defendant, being first duly sworn, was examined, and testified as follows:

The Clerk: Please state your full name and spell your last name.

The Witness: Howard Conkle, C-o-n-k-l-e.

Direct Examination

Q. (By Mr. Bowden): Will you state your occupation?

A. My occupation is that of—sometimes I am termed an Engineering Revenue Agent, and at other times an Internal Revenue Agent, both being the same thing, synonymous.

Q. How long have you been engaged in this occupation?

A. I have been connected with the Internal Revenue Service since June of 1949.

(Testimony of Howard Conkle.)

Q. During the course of your duties did you have occasion to examine the partnership return of income filed by the Johnson-Mavor Logging Company for the fiscal year ended February 29, 1948?

A. I did.

Q. During the course of that examination did you have occasion to examine the contract entered into between Puget Sound Pulp and Timber Company and Johnson-Mavor? [35]

A. I did.

Q. During the course of your work in general have you had occasion to examine contracts entered into between timber owners, timber purchasers, and people in the timber business?

A. Yes. That is one of the purposes of our examination.

Q. And during the course of your work have you come to any observations in respect to agreements entered into between people interested in buying and people interested in selling timber?

Mr. Simon: I object to that as not a proper question.

The Court: I think the form of the question is objectionable. Rephrase it.

Q. (By Mr. Bowden): Would you please explain the general methods used to sell timber?

Mr. Simon: That is objected to as a repetition, if the Court please.

The Court: It is repetitious, but merely on that ground I wouldn't exclude it. Overruled. Go ahead.

Q. (By Mr. Bowden): You may answer.

A. I believe that explanation that has been given

(Testimony of Howard Conkle.)

previously is quite accurate. These transactions consist primarily of three types; one, is that type in which the land and [36] timber is sold outright; secondly, the type is that in which a timber deed is given by the seller to the purchaser of the property and the seller retaining the interest in the land only, and the third type which comes under, for example, Section 117(k)(1) is that type in which the timber is sold, the purchaser acquiring all of the interest in the timber at the time the timber is cut and pays for the timber as it is cut. In other words, that is what would be construed as a cutting contract of sale of the timber.

Q. Now, during the course of your examination you had occasions to examine the contract entered into between Johnson and Mavor and the Puget Sound Pulp and Timber Company, is that correct?

A. Yes.

Q. And during the course of your examination you also examined the partnership return, the return previously referred to, is that correct?

A. I might explain that the function of an Engineer Agent for the Internal Revenue Service is not an accounting function but it has principally to do with valuation problems, in some cases the treatment of contracts, so that in this case the thing that I was—the item which I principally was concerned with was the review of the taxpayers or the partnership and the partnership's [37] claim under Section 117(k)(1), and the other item I was principally concerned with was the depreci-

(Testimony of Howard Conkle.)

ation which was claimed on the return on the machinery and equipment.

Q. What was your concern of what you termed 117(k)(1)?

Mr. Simon: I object to that as irrelevant and immaterial.

The Court: Sustained.

Q. (By Mr. Bowden): In examining into these matters that you have referred to, did you have occasion to examine the method used in reporting income received under the contract in question?

Mr. Simon: That is objected to as irrelevant and immaterial. There is a stipulation covering the facts with reference to it.

Mr. Bowden: All I want the witness to do is tell what the witness did during the course of his examination.

Mr. Simon: That is irrelevant and immaterial.

Mr. Bowden: I think it is very important, your Honor, to show the basis upon which this case is in this court right now.

The Court: Well, it is not clear to me. If there is some fact that he discovered about the situation that has some bearing on it, he can [38] tell us about that, but his reasoning or what he did apart from that, it seems to me that is irrelevant. We have but a single question presented here.

Mr. Bowden: Well, I concur with your Honor's statement.

The Court: If there is some information or fact that he came to learn that would have a bearing on

(Testimony of Howard Conkle.)

our problem, I don't want to preclude him from stating it. There is no use of going into details of what he did or didn't do.

Mr. Bowden: This witness will only testify what the result of his examination was.

Mr. Simon: That is objected to. That is covered by the stipulation.

The Court: We will hear it, and we will get on with it quicker that way. I won't pay any attention to it if it is irrelevant. Go ahead, please.

Q. (By Mr. Bowden): Please explain the adjustments that he recommended as a result of your examination.

A. The function of an Engineer Revenue Agent is——

Mr. Simon: I object to that as not responsive.

The Court: Respond to the question, Mr. Conkle, please. [39]

The Witness: Upon examination of the partnership return I discussed the case with Mr. Bruce, one of the partners, and with Mr. Martin. At that time a member of the accounting firm of Ernst and Ernst, Certified Public Accountants in Seattle, and I advised them since maybe—I better rephrase that.

It was necessary for me to suggest to them that I would be obliged to recommend that their claim under Section 117(k)(1) be disallowed. I also advised them of the reasons.

Q. (By Mr. Bowden): What were those reasons?

(Testimony of Howard Conkle.)

Mr. Simon: That is objected to as irrelevant and immaterial, and I move that the last answer be stricken.

The Court: I will let him answer, and we will get on with it quicker that way. If it is immaterial, and it sounds like it is, I will so treat it. Go ahead.

Q. (By Mr. Bowden): Very briefly explain your reasons and we will be on with it.

A. Briefly it has to do with these three types of sales, the lump sum purchase of timber and land owned, the purchase of standing timber only leaving the land in the owner's name, and what would be called in the [40] industry—and which is known in the industry as a cutting contract in which the timber stumpage is sold to a purchaser and the purchaser receives all of the right, title, and interest in the timber at the time of the felling, and he can sell the logs to whomsoever he pleases, and actually, if he desires to under what is known as a cutting contract in the industry, he can in turn engage in a second cutting contract and resell that standing timber. That is provided for in the '54 Code.

Mr. Simon: If the Court please, it seems to me perfectly obvious that this witness is giving a dissertation on what he regards as the law of timber sales generally.

The Court: It seems so to me, Mr. Simon, but up to now this is just all the witness's idea about it. In the last analysis my judgment about the ef-

(Testimony of Howard Conkle.)

fect of this contract and the law has got to be controlling.

Q. (By Mr. Bowden): There is no need to go on further with that. May I ask one further question. Your recommendation was based on your reading and understanding of this agreement, is that correct?

A. Yes, that is correct.

Mr. Bowden: No further questions. [41]

Mr. Simon: No questions.

The Court: Nothing further, Mr. Conkle. You are excused.

(Witness excused.)

The Court: Is there anything further?

Mr. Bowden: Nothing further, your Honor.

The Court: Well, if the evidence is concluded, I think I will take a short recess and then I will listen to you in argument.

(Thereupon a short recess was taken.)

(Thereupon oral argument of counsel was rendered.)

The Court: A very difficult question is presented. In the Ellison case the contract was at great pains to emphasize that the logger under no conditions or circumstances would have any title to the timber or the logs at any point in the operations.

I remember that the contract was drafted by Ed Eisenhower who apparently wanted to be real sure it would so provide because he put language in the contract about three or four different times and places to make it plain that under no conceivable

circumstances would the logger have any title to timber or logs. I think I am right in that, am I not? I haven't reviewed it or looked back at my decision or anything else, but that is my [42] recollection of it. I remember that I was impressed with that circumstance in rendering my decision after looking at *Carlin vs. Commissioner*, because *Carlin vs. Commissioner* made it plain that if it was a pure matter of rendering services, the logger wasn't entitled to the benefit of section 117(k)(1). Since in the *Ellison* case the logger under no circumstances ever had any title to timber, logs or lumber of any kind whatsoever, the only thing he could have been doing was to be rendering services. There was no other possible relationship between the owner of the timber and the logger under the terms of the contract and under the evidence presented.

Now, this case is quite different because here we have a contract that, to say the least of it, does not expressly and emphatically provide for non-title in the logger. However, the disappointed taxpayer, *Ellison*, is seeking a review of our decision in that case, and it may be that we were in error. Of course, if *Ellison* were reversed, there wouldn't be any argument in this case at all, would there? I mean this case much more nearly conforms to what the section calls for than *Ellison* did, and it may be that the Circuit Court will say I was wrong in *Ellison*. If they do, it looks to me like they are going to have to back up a [43] little bit on *Carlin* to do so, but that is not an insurmountable ob-

stance in an appellate court or any other one for that matter.

What I am thinking is this, I wonder if it wouldn't be better for the interests of all concerned if I held the decision in this case until Ellison is decided, because if Ellison is reversed, that is an end to this case and there is no use of worrying about it any further. If it is not reversed, there may be something said in the opinion that would be of some value in passing on the present case.

Now, I will go on from there to say this, that I have no doubt in my mind at all but what the pulp company in the present case was interested in getting its logs cut, and that essentially is what they were out for, was getting the timber cut on some kind of favorable basis by a reliable logger and so forth. So that if I could just decide the case simply on what essentially was desired and intended by the parties, I wouldn't find much difficulty in coming to that conclusion. However, that is not the basis on which the case has to be decided. In tax cases particularly, there is no use of talking about barnyard equity. There is none involved. It is just a question of what Congress has provided by certain language, which often is very difficult [44] to understand and follow. If the taxpayer's situation comes within the language, then he is in it. If he doesn't come within it, he is out of it. It doesn't make any difference how much I think he ought to be in or out. I don't concern myself with it. It is simply a question of does the

taxpayer come within the language of Congress or doesn't he?

In this particular case it appears very difficult to tell whether this taxpayer comes in within the language in question or not. I must say that the counsel drafting this contract, whom you did not identify but whom I am quite ready to agree are quite capable, have drawn a most artful contract in this situation. You can't escape the conclusion that at least for a little while, it is true under all kinds of safeguards, to some extent the logger has a proprietary interest in those logs. Precisely how long or to what extent, there is no need of considering because the section says, "If the cutting of timber for sale or use in the taxpayer's trade or business—" "during such year by the taxpayer who owns or has a contract right to cut such timber and has held the contract for a period of more than six months—" I assume the six months' factor is not in dispute is it?

Mr. Bowden: No, your Honor. [45]

The Court: Now, "cutting of timber for the sale or use in the taxpayer's trade or business." Well, it looks like Johnson and Mavor qualify under that language. Whether that is what Congress intended or not, that is what they said. I can't tell very much about that. I rather suspect that they didn't quite mean it that way, but they didn't say so.

Mr. Bowden: I would like to interrupt.

The Court: I am about finished with my ruminations.

Mr. Bowden: I might make one suggestion. I am looking forward to the Ninth Circuit opinion in Ellison. I don't mean to delay this case at all, but I do feel that this area needs some illumination, and this is what I would consider a fringe case. Maybe we are getting into that twilight area that requires the Ninth Circuit and maybe the Supreme Court, but I would have no objection if your Honor would care to hold this off until we did get a result in Ellison.

The Court: I must say that I lean towards holding for the taxpayers in this case because I do think that under this particular contract, granting that it was a masterpiece of circumlocution, nevertheless it does provide that at least under some conditions and to some extent or other, the logger has some proprietary interests [46] in the logs he cuts. It is hedged about with all sorts of provisions to protect the owner from any loss, that is true.

I rather think, Mr. Simon and Mr. Bowden, that the probabilities are that that Ellison case will be decided shortly because it is quite sometime ago now, I think, that it was ready for hearing. I don't know whether it has been argued. If Ellison gets reversed I won't have to strain on the present case at all, because that would be an end of it. If it doesn't get reversed, then I will decide this one, but I have a feeling at the present moment, and I am subject to change of mind, of course, that in this instance the taxpayer has come within the requirements of the section, although it is not, certainly, free from doubt.

Well, gentlemen, I think that at least for a reasonable period I will withhold decision because there is no use of putting either one of you to an appeal in this case if the Ellison decision is reversed. I think it best I hold this case for decision until we see what they say in the Ellison case, and so I will take the matter under advisement pending the disposition of Ellison. In the meantime, if Ellison goes on for any length of time without decision or you learn that there is likely to be any great delay in decision, I will not further delay decision of the present case. [47]

[Endorsed]: Filed November 22, 1957.

[Endorsed]: No. 15737. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Pete Johnson, F. Douglas Mavor, Jane Kendle Mavor, Nelson T. Bruce and Cleo Bruce, Appellees. Transcript of Record. Appeal from the United States District Court for the Western District of Washington, Northern Division.

Filed: October 7, 1957.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for
the Ninth Circuit.

